BRB No. 03-0810 BLA

KENNETH LOWE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 06/29/2004
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY c/o ACORDIA EMPLOYERS SERVICES CORPORATION	)	
	)	
Employer/Carrier- Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5126) of Administrative Law Judge Rudolf L. Jansen denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with twenty-four years of qualifying coal mine employment pursuant to the parties' stipulation, and, based on the date

of filing, adjudicated the claim pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's original claim, filed on February 5, 1999, had been denied by the district director on May 25, 1999, as the evidence did not establish the existence of pneumoconiosis or total disability. The administrative law judge determined that the present claim, filed on January 26, 2001, was subject to the provisions at 20 C.F.R. §725.309(d), and found that the newly-submitted evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), thus claimant failed to demonstrate a change in one of the applicable conditions of entitlement. Accordingly, benefits were denied.

On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4), and total disability at Section 718.204(b)(2)(iv).[1] Employer responds, urging affirmance of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to

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[1]Claimant's reference to "Section 718.204(c)(4)" is misplaced. The regulation regarding establishing total disability by a reasoned medical opinion is now contained in 20 C.F.R. §718.204(b)(2)(iv).

[2]Although employer, Bledsoe Coal Corporation, was not listed in the caption of the administrative law judge's Decision and Order, the record reflects that it was identified as the responsible operator in this case. Director's Exhibit 16.

[3]We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) or total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[4] In considering the medical opinions at Section 718.204(b)(2)(iv), the administrative law judge properly concluded that the evidence was insufficient to establish total disability because no physician of record offered an opinion sufficient to establish a totally disabling respiratory or pulmonary impairment.[5] Decision and Order at 6-7, 11; Director's Exhibits 1, 13; Employer's Exhibits 1, 2, 4, 5; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). We reject claimant's contention that the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's assessment of disability. The administrative law judge accurately reviewed Dr. Baker's diagnosis of minimal or no respiratory impairment, and properly determined that this opinion was insufficient to establish total disability as the physician concluded that claimant was capable of performing his usual coal mine employment. Decision and Order at 7, 11; Director's Exhibits 1, 13; *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *see generally Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.[6]

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[4]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), lay testimony along cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

[6]Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are relevant only to claimant's ability to perform comparable and gainful work, an issue which was not reached in that case since the administrative law judge found that the miner did not establish that he had any impairment which disabled him from performing his usual coal mine employment. *Id.*

See Ramey v. Kentland-Elkhorn Coal Corp, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985);*Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence.[7] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). The administrative law judge's finding that the evidence of record is insufficient to establish that claimant is totally disabled by a respiratory or pulmonary condition is supported by substantial evidence and is affirmed. Claimant's failure to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718, thus we need not address claimant=s other arguments on appeal regarding the existence of pneumoconiosis at Section 718.202(a)(1), (4). Consequently, we affirm the administrative law judge's denial of benefits.

[7]We reject claimant's general contention that the inadvisability of claimant's return to work in dusty conditions is sufficient to establish a totally disabling respiratory impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge